

Jan 21, 2020

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

AMANDA S.,¹

Plaintiff,

vs.

ANDREW M. SAUL,
COMMISSIONER OF SOCIAL
SECURITY,²

Defendant.

No. 1:19-cv-03115-MKD

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND DENYING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

ECF Nos. 14, 15

¹ To protect the privacy of plaintiffs in social security cases, the undersigned identifies them by only their first names and the initial of their last names.

² Andrew M. Saul is now the Commissioner of the Social Security Administration. Accordingly, the Court substitutes Andrew M. Saul as the Defendant and directs the Clerk to update the docket sheet. *See* Fed. R. Civ. P. 25(d).

1 Before the Court are the parties' cross-motions for summary judgment. ECF
2 Nos. 14, 15-16.³ The parties consented to proceed before a magistrate judge. ECF
3 No. 6. The Court, having reviewed the administrative record and the parties'
4 briefing, is fully informed. For the reasons discussed below, the Court grants
5 Plaintiff's motion, ECF No. 14, and denies Defendant's motion, ECF No. 15.

6 JURISDICTION

7 The Court has jurisdiction over this case pursuant to 42 U.S.C. § 1383(c)(3).

8 STANDARD OF REVIEW

9 A district court's review of a final decision of the Commissioner of Social
10 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is
11 limited; the Commissioner's decision will be disturbed "only if it is not supported
12 by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153,
13 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a
14 reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159
15 (quotation and citation omitted). Stated differently, substantial evidence equates to
16 "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and
17 citation omitted). In determining whether the standard has been satisfied, a

18
19 ³ Defendant filed a motion for summary judgment, ECF No. 15, and subsequently
20 filed an amended motion for summary judgment, ECF No. 16, 16-1.

1 reviewing court must consider the entire record as a whole rather than searching
2 for supporting evidence in isolation. *Id.*

3 In reviewing a denial of benefits, a district court may not substitute its
4 judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152,
5 1156 (9th Cir. 2001). If the evidence in the record “is susceptible to more than one
6 rational interpretation, [the court] must uphold the ALJ’s findings if they are
7 supported by inferences reasonably drawn from the record.” *Molina v. Astrue*, 674
8 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court “may not reverse an
9 ALJ’s decision on account of an error that is harmless.” *Id.* An error is harmless
10 “where it is inconsequential to the [ALJ’s] ultimate nondisability determination.”
11 *Id.* at 1115 (quotation and citation omitted). The party appealing the ALJ’s
12 decision generally bears the burden of establishing that it was harmed. *Shinseki v.*
13 *Sanders*, 556 U.S. 396, 409-10 (2009).

14 **FIVE-STEP EVALUATION PROCESS**

15 A claimant must satisfy two conditions to be considered “disabled” within
16 the meaning of the Social Security Act. First, the claimant must be “unable to
17 engage in any substantial gainful activity by reason of any medically determinable
18 physical or mental impairment which can be expected to result in death or which
19 has lasted or can be expected to last for a continuous period of not less than twelve
20 months.” 42 U.S.C. § 1382c(a)(3)(A). Second, the claimant’s impairment must be

1 “of such severity that he is not only unable to do his previous work[,] but cannot,
2 considering his age, education, and work experience, engage in any other kind of
3 substantial gainful work which exists in the national economy.” 42 U.S.C. §
4 1382c(a)(3)(B).

5 The Commissioner has established a five-step sequential analysis to
6 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §
7 416.920(a)(4)(i)-(v). At step one, the Commissioner considers the claimant’s work
8 activity. 20 C.F.R. § 416.920(a)(4)(i). If the claimant is engaged in “substantial
9 gainful activity,” the Commissioner must find that the claimant is not disabled. 20
10 C.F.R. § 416.920(b).

11 If the claimant is not engaged in substantial gainful activity, the analysis
12 proceeds to step two. At this step, the Commissioner considers the severity of the
13 claimant’s impairment. 20 C.F.R. § 416.920(a)(4)(ii). If the claimant suffers from
14 “any impairment or combination of impairments which significantly limits [his or
15 her] physical or mental ability to do basic work activities,” the analysis proceeds to
16 step three. 20 C.F.R. § 416.920(c). If the claimant’s impairment does not satisfy
17 this severity threshold, however, the Commissioner must find that the claimant is
18 not disabled. 20 C.F.R. § 416.920(c).

19 At step three, the Commissioner compares the claimant’s impairment to
20 severe impairments recognized by the Commissioner to be so severe as to preclude

1 a person from engaging in substantial gainful activity. 20 C.F.R. §
2 416.920(a)(4)(iii). If the impairment is as severe or more severe than one of the
3 enumerated impairments, the Commissioner must find the claimant disabled and
4 award benefits. 20 C.F.R. § 416.920(d).

5 If the severity of the claimant's impairment does not meet or exceed the
6 severity of the enumerated impairments, the Commissioner must pause to assess
7 the claimant's "residual functional capacity." Residual functional capacity (RFC),
8 defined generally as the claimant's ability to perform physical and mental work
9 activities on a sustained basis despite his or her limitations, 20 C.F.R. §
10 416.945(a)(1), is relevant to both the fourth and fifth steps of the analysis.

11 At step four, the Commissioner considers whether, in view of the claimant's
12 RFC, the claimant is capable of performing work that he or she has performed in
13 the past (past relevant work). 20 C.F.R. § 416.920(a)(4)(iv). If the claimant is
14 capable of performing past relevant work, the Commissioner must find that the
15 claimant is not disabled. 20 C.F.R. § 416.920(f). If the claimant is incapable of
16 performing such work, the analysis proceeds to step five.

17 At step five, the Commissioner considers whether, in view of the claimant's
18 RFC, the claimant is capable of performing other work in the national economy.
19 20 C.F.R. § 416.920(a)(4)(v). In making this determination, the Commissioner
20 must also consider vocational factors such as the claimant's age, education and

1 past work experience. 20 C.F.R. § 416.920(a)(4)(v). If the claimant is capable of
2 adjusting to other work, the Commissioner must find that the claimant is not
3 disabled. 20 C.F.R. § 416.920(g)(1). If the claimant is not capable of adjusting to
4 other work, the analysis concludes with a finding that the claimant is disabled and
5 is therefore entitled to benefits. 20 C.F.R. § 416.920(g)(1).

6 The claimant bears the burden of proof at steps one through four above.
7 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
8 step five, the burden shifts to the Commissioner to establish that (1) the claimant is
9 capable of performing other work; and (2) such work “exists in significant
10 numbers in the national economy.” 20 C.F.R. § 416.960(c)(2); *Beltran v. Astrue*,
11 700 F.3d 386, 389 (9th Cir. 2012).

12 **ALJ’S FINDINGS**

13 On May 6, 2013, Plaintiff applied for Title XVI supplemental security
14 income benefits alleging a disability onset date of May 14, 2008. Tr. 137, 456-67.
15 The application was denied initially, and on reconsideration. Tr. 253-65, 269-80.
16 Plaintiff appeared before an administrative law judge (ALJ) on February 12, 2015.
17 Tr. 40-95. On May 26, 2015, the ALJ denied Plaintiff’s claim. Tr. 170-90. On
18 December 22, 2016, the Appeals Council remanded the case to an ALJ to resolve
19 issues involving additional evidence of hand pain submitted in connection with
20 Plaintiff’s request for review, the ALJ’s failure to make a finding about the effect

1 of Plaintiff's sleep apnea, and Plaintiff's past relevant work. Tr. 191-94. On
2 remand, the Appeals Council instructed the ALJ to obtain additional evidence
3 concerning Plaintiff's medically determinable impairments, give further
4 consideration to Plaintiff's maximum RFC, provide appropriate rationale with
5 specific references to record evidence in support of the assessed limitations, and, if
6 warranted by the expanded record, obtain supplemental evidence from a vocational
7 expert to clarify the effect of the assessed limitations on Plaintiff's occupational
8 base. Tr. 194.

9 On December 4, 2017, Plaintiff appeared before the same ALJ for a second
10 hearing. Tr. 96-120. On May 31, 2018, the ALJ denied Plaintiff's claim. Tr. 12-
11 36. At step one of the sequential evaluation process, the ALJ found that Plaintiff
12 had not engaged in substantial gainful activity since May 6, 2013. Tr. 17. At step
13 two, the ALJ found that Plaintiff had the following severe impairments: obesity,
14 asthma, disorders of the female genital organs, chronic venous insufficiency,
15 affective disorders, and anxiety disorders. Tr. 17.

16 At step three, the ALJ found that Plaintiff did not have an impairment or
17 combination of impairments that met or medically equaled the severity of a listed
18 impairment. Tr. 18. The ALJ then concluded that Plaintiff had the RFC to
19 perform sedentary work with the following limitations:

20 [Plaintiff] can occasionally lift and or carry 10 pounds and 10 pounds
frequently; she can stand and or walk with normal breaks for a total of

1 about 2 hours in an 8-hour workday and sit with normal breaks for a
2 total of about 6 hours in an 8-hour workday; she can frequently
3 balance; she can occasionally climb ramps and stairs, stoop, kneel,
4 crouch, and crawl; she can never climb ladders, ropes, or scaffolds;
5 she should avoid concentrated exposure to extreme cold, extreme
6 heat, hazards (i.e. dangerous machinery, unprotected heights, etc.);
7 and fumes, odors, dusts, gases, and poor ventilation; she can
8 understand and remember simple, routine instructions with customary
9 breaks and lunch; she can sustain concentration, persistence, and pace
10 for the regular completion of simple and repetitive tasks; she can have
11 superficial contact with coworkers for work tasks; there should be no
12 contact with the general public for work tasks; she is not able to
13 perform at a production rate pace (e.g., assembly line work as where
14 the pace is mechanically controlled) but can perform goal oriented
15 work or where the worker has more control over the pace; and she
16 may be off task up to 10% over the course of an 8-hour workday.

17 Tr. 19-20.

18 At step four, the ALJ found that Plaintiff had no past relevant work. Tr. 24.

19 At step five, the ALJ found that, considering Plaintiff's age, education, work
20 experience, RFC, and testimony from the vocational expert, there were jobs that
existed in significant numbers in the national economy that Plaintiff could perform,
such as escort vehicle driver, document preparer, and toy stuffer. Tr. 24-25.

Therefore, the ALJ concluded that Plaintiff was not under a disability, as defined in
the Social Security Act, from the date of the application though the date of the
decision. Tr. 25.

On March 27, 2019, the Appeals Council denied review of the ALJ's
decision, Tr. 1-6, making the ALJ's decision the Commissioner's final decision for
purposes of judicial review. *See* 42 U.S.C. § 1383(c)(3).

1 **ISSUES**

2 Plaintiff seeks judicial review of the Commissioner’s final decision denying
3 her supplemental security income benefits under Title XVI of the Social Security
4 Act. Plaintiff raises the following issues for review:

- 5 1. Whether the ALJ conducted a proper step-two analysis;
6 2. Whether the ALJ properly evaluated Plaintiff’s symptom claims; and
7 3. Whether the ALJ properly evaluated the medical opinion evidence.

8 ECF No. 14 at 2, 10-14.

9 **DISCUSSION**

10 **A. Step Two**

11 Plaintiff faults the ALJ for failing to find at step two that Plaintiff’s back and
12 hand pain were severe impairments. ECF No. 14 at 10-14.⁴ At step two of the
13 sequential process, the ALJ must determine whether the claimant suffers from a
14 “severe” impairment, i.e., one that significantly limits her physical or mental
15 ability to do basic work activities. 20 C.F.R. § 416.920(c). To show a severe
16 impairment, the claimant must first prove the existence of a physical or mental
17 impairment by providing medical evidence consisting of signs, symptoms, and

18 _____
19 ⁴ Plaintiff did not list a Step Two challenge in the statement of issues, ECF No. 14
20 at 2, but appears to present such a challenge in the brief, ECF No. 14 at 10-14.

laboratory findings; the claimant's own statement of symptoms alone will not suffice. 20 C.F.R. § 416.921.

An impairment may be found to be not severe when "medical evidence establishes only a slight abnormality or a combination of slight abnormalities which would have no more than a minimal effect on an individual's ability to work...." Social Security Ruling (SSR) 85-28 at *3. Similarly, an impairment is not severe if it does not significantly limit a claimant's physical or mental ability to do basic work activities; which include walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling; seeing, hearing, and speaking; understanding, carrying out, and remembering simple instructions; using judgment; responding appropriately to supervision, coworkers and usual work situations; and dealing with changes in a routine work setting. 20 C.F.R. § 416.922; SSR 85-28 at *3.⁵

Step two is "a de minimus screening device [used] to dispose of groundless claims." *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996). "Thus, applying our normal standard of review to the requirements of step two, [the Court] must

⁵ The Supreme Court upheld the validity of the Commissioner's severity regulation, as clarified in SSR 85-28, in *Bowen v. Yuckert*, 482 U.S. 137, 153-54 (1987).

1 determine whether the ALJ had substantial evidence to find that the medical
2 evidence clearly established that [Plaintiff] did not have a medically severe
3 impairment or combination of impairments.” *Webb v. Barnhart*, 433 F.3d 683, 687
4 (9th Cir. 2005).

5 Here, the ALJ concluded at step two that Plaintiff had the severe
6 impairments of obesity, asthma, disorders of the female genital organs, chronic
7 venous insufficiency, affective disorders, and anxiety disorders. Tr. 17. The ALJ
8 also concluded that Plaintiff’s back pain, obstructive sleep apnea, hand pain, and
9 headaches/migraines were non-severe impairments. Tr. 17-18. After detailing the
10 medical evidence pertaining to Plaintiff’s non-severe impairments, the ALJ
11 concluded that these impairments did not more than minimally impact Plaintiff’s
12 ability to perform basic work activities. Tr. 17-18.

13 Plaintiff asserts the ALJ erred by finding that her back pain was not a severe
14 impairment, as she was diagnosed with degenerative spondylosis of the lower
15 lumbar spine and a central herniation/protrusion of the L5-S1 disc deforming the
16 thecal sac. ECF No. 14 at 11, n. 2 (citing Tr. 1301, 2284). Although Plaintiff cites
17 treatment notes where these conditions were diagnosed, observed, or reported, the
18 “mere diagnosis of an impairment ... is not sufficient to sustain a finding of
19 disability.” *Key v. Heckler*, 754 F.2d 1545, 1549 (9th Cir. 1985). Plaintiff
20 identifies no evidence in the record that minimal degenerative spondylosis of the

1 lower lumbar spine, or a central protrusion of the L5-S1 disc had any impact on her
2 basic work abilities. ECF No. 14 at 10-12; *see* Tr. 1301, 2284. While there were
3 notations in the medical record that Plaintiff endorsed symptoms of back pain, *see*,
4 *e.g.*, Tr. 947, 1289, 2210, 2230, 2244, the ALJ's finding that Plaintiff's back
5 condition was not a severe impairment is supported by the objective medical
6 evidence. *See, e.g.*, Tr. 1307 (January 2015: imaging of Plaintiff's spine showed
7 only mild spondylosis with disc space narrowing, but no acute fracture or
8 subluxation); Tr. 1279, 1282 (April 2015: Plaintiff's doctor denied narcotics for
9 pain because Plaintiff's lumbar and thoracic x-rays did not support a back pain
10 diagnosis); Tr. 1301 (May 2015: an MRI of Plaintiff's spine showed a central
11 herniation/protrusion of the L5-S1 disc with otherwise unremarkable findings); Tr.
12 1272-73 (June 2015: after reviewing Plaintiff's MRI results, Plaintiff's doctor
13 recommended conservative treatment with postural and bra adjustments; he also
14 performed osteopathic manipulative treatment which resulted in improved pain
15 levels); Tr. 1305 (January 2016: images of Plaintiff's thoracic spine showed only
16 mild scoliosis with spondylosis); Tr. 2284 (October 2017: x-rays of Plaintiff's
17 lumbar spine revealed only minimal degenerative spondylosis of the lower lumbar
18 spine); Tr. 1097, 1289, 2210, 2230, 2244, 2254, 2411 (June 2014, March 2015,
19 March 2016, May 2016, November 2016, April 2017, and June 2017: examinations
20

1 consistently showed normal gait and station). On this record, the ALJ reasonably
2 concluded that Plaintiff's back pain was not a severe impairment. Tr. 17-18.

3 Plaintiff also argues the ALJ erred by finding that her hand pain was not a
4 severe impairment, asserting that she was diagnosed with carpal tunnel syndrome.
5 ECF No. 14 at 13-14. The "mere diagnosis of an impairment ... is not sufficient to
6 sustain a finding of disability." *Key*, 754 F.2d at 1549. Again, Plaintiff identifies
7 no evidence in the record that her hand pain had any impact on her basic work
8 abilities. ECF No. 14 at 13-14. While there were notations in the medical record
9 that Plaintiff endorsed symptoms of hand pain, the ALJ's finding that Plaintiff's
10 hand condition was not a severe impairment is supported by the objective medical
11 evidence. *See, e.g.*, Tr. 1296 (January 2015: Plaintiff reported a one-week history
12 of hand pain, and on physical examination she had poor movement of her hands
13 bilaterally but she had no numbness⁶ or lack of feeling); Tr. 1281-83, 1294

14

15 ⁶ Plaintiff contends the ALJ's finding that she "had no numbness or lack of
16 feeling" in her hands was contrary to the medical record. ECF No. 14 at 13 (citing
17 Tr. 18). However, the ALJ referenced a specific physical examination in January
18 2015 when Plaintiff reported one-week of hand pain and she had no numbness or
19 lack of feeling on examination. Tr. 18 (citing Tr. 1296). The ALJ's finding is not
20 contrary to the medical record.

1 (February and April 2015: Plaintiff received injections for her hand pain and
2 reported improvement); Tr. 1294 (February 2015: Plaintiff reported that she “knits
3 for an activity”); Tr. 65 (February 2015: at Plaintiff’s first hearing, she testified
4 that her doctor was trying to determine whether she had arthritis in her hands or
5 carpal tunnel syndrome); Tr. 1283-84 (April 2015: Plaintiff exhibited a positive
6 Tinel’s sign and complained of left hand pain, hand tingling, and left hand
7 numbness; her doctor assessed neuropathic pain of the hand and indicated that it
8 was “possibly” carpal tunnel syndrome); Tr. 2069 (April 2017: Plaintiff reported
9 that she enjoyed doing crafts, crocheting, and coloring). On this record, the ALJ
10 reasonably concluded that Plaintiff’s hand pain was not a severe impairment.

11 Moreover, Plaintiff has failed to establish any harmful error resulting from
12 the ALJ’s decision to find that her back and hand conditions were non-severe
13 impairments. Even if the ALJ should have determined that her back and hand
14 conditions were severe impairments, any error would be harmless because the step
15 was resolved in Plaintiff’s favor. *See Stout v. Comm’r of Soc. Sec. Admin.*, 454
16 F.3d 1050, 1055 (9th Cir. 2006); *Burch v. Barnhart*, 400 F.3d 676, 682 (9th Cir.
17 2005). Plaintiff makes no showing that either of these conditions created
18 limitations not already accounted for in the RFC. *See Shinseki*, 556 U.S. at 409-10

1 (the party challenging the ALJ's decision bears the burden of showing harm).

2 Thus, the ALJ's step two finding is legally sufficient.

3 **B. Plaintiff's Symptom Claims**

4 Plaintiff faults the ALJ for failing to rely on clear and convincing reasons in
5 discrediting her symptom claims. ECF No. 14 at 6-14. An ALJ engages in a two-
6 step analysis to determine whether to discount a claimant's testimony regarding
7 subjective symptoms. SSR 16-3p, 2016 WL 1119029, at *2. "First, the ALJ must
8 determine whether there is objective medical evidence of an underlying
9 impairment which could reasonably be expected to produce the pain or other
10 symptoms alleged." *Molina*, 674 F.3d at 1112 (quotation marks omitted). "The
11 claimant is not required to show that [the claimant's] impairment could reasonably
12 be expected to cause the severity of the symptom [the claimant] has alleged; [the
13 claimant] need only show that it could reasonably have caused some degree of the
14 symptom." *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009).

15 Second, "[i]f the claimant meets the first test and there is no evidence of
16 malingering, the ALJ can only reject the claimant's testimony about the severity of
17 the symptoms if [the ALJ] gives 'specific, clear and convincing reasons' for the
18 rejection." *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (citations
19 omitted). General findings are insufficient; rather, the ALJ must identify what
20 symptom claims are being discounted and what evidence undermines these claims.

1 *Id.* (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995); *Thomas v.*
2 *Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) (requiring the ALJ to sufficiently
3 explain why it discounted claimant’s symptom claims)). “The clear and
4 convincing [evidence] standard is the most demanding required in Social Security
5 cases.” *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014) (quoting *Moore v.*
6 *Comm’r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

7 Factors to be considered in evaluating the intensity, persistence, and limiting
8 effects of a claimant’s symptoms include: 1) daily activities; 2) the location,
9 duration, frequency, and intensity of pain or other symptoms; 3) factors that
10 precipitate and aggravate the symptoms; 4) the type, dosage, effectiveness, and
11 side effects of any medication an individual takes or has taken to alleviate pain or
12 other symptoms; 5) treatment, other than medication, an individual receives or has
13 received for relief of pain or other symptoms; 6) any measures other than treatment
14 an individual uses or has used to relieve pain or other symptoms; and 7) any other
15 factors concerning an individual’s functional limitations and restrictions due to
16 pain or other symptoms. SSR 16-3p, 2016 WL 1119029, at *7; 20 C.F.R. §
17 416.929(c)(3). The ALJ is instructed to “consider all of the evidence in an
18 individual’s record,” “to determine how symptoms limit ability to perform work-
19 related activities.” SSR 16-3p, 2016 WL 1119029, at *2.

1 The ALJ found that Plaintiff's medically determinable impairments could
2 reasonably be expected to cause some of the alleged symptoms, but that Plaintiff's
3 statements concerning the intensity, persistence, and limiting effects of her
4 symptoms were not entirely consistent with the evidence. Tr. 20-21.

5 *1. Not Supported by Objective Medical Evidence*

6 The ALJ found that Plaintiff's symptom complaints were not supported by
7 the objective medical evidence. Tr. 21-23. An ALJ may not discredit a claimant's
8 symptom testimony and deny benefits solely because the degree of the symptoms
9 alleged is not supported by the objective medical evidence. *Rollins v. Massanari*,
10 261 F.3d 853, 857 (9th Cir. 2001); *Bunnell v. Sullivan*, 947 F.2d 341, 346-47 (9th
11 Cir. 1991). However, the objective medical evidence is a relevant factor, along
12 with the medical source's information about the claimant's pain or other
13 symptoms, in determining the severity of a claimant's symptoms and their
14 disabling effects. *Rollins*, 261 F.3d at 857; 20 C.F.R. § 416.929(c)(2).

15 a. Mental Impairments

16 The ALJ found that the mental status examinations in the record did not
17 support Plaintiff's allegations of disabling mental health impairments, such as
18 anxiety, flashbacks, depressive episodes, and difficulty being around many people.
19 Tr. 22-23; *see* Tr. 939, 941-42 (May 29, 2013: upon mental status examination by
20 Mark Duris, Ph.D., Plaintiff demonstrated normal speech, was "generally open,

1 cooperative and relatively genuine in her responses,” her mood was “generally
2 euthymic” with normal affect, and she had normal thought process and content,
3 orientation, perception, memory, fund of knowledge, concentration, abstract
4 thought, and insight and judgment; Dr. Duris diagnosed Plaintiff with PTSD,
5 moderate major depressive disorder, recurrent, ADHD, borderline personality
6 disorder, and dependent personality disorder); Tr. 1172 (December 10, 2014: upon
7 mental status examination during a crisis assessment, Plaintiff presented as
8 pleasant and cooperative, showed full range of emotion, was congruent to topic,
9 had clear and spontaneous speech, good eye contact, appropriate dress, intact and
10 goal directed thoughts, no evidence of thought disorder or delusional content, her
11 insight and judgment were fair, and she reported no hallucinations, but she
12 endorsed PTSD symptoms, suicidal thoughts, and self-harm action (burning)); Tr.
13 2230 (November 14, 2016: at a visit for physical pain management, William
14 Powell, DO, conducted a mental status examination and found Plaintiff to have
15 normal thought content with the ability to perform basic computations and apply
16 abstract reasoning, intact associations, appropriate judgment and insight, no
17 evidence of hallucinations, delusions, obsessions, or homicidal/suicidal ideation,
18 and Plaintiff was happy, stable, and not anxious); Tr. 2250 (April 26, 2016: same);
19 Tr. 2262 (December 8, 2015: same); Tr. 2265 (October 27, 2015: same); Tr. 2194
20 (June 2017: at a visit for physical pain management, Clint Thompson, DO,

1 conducted a mental status examination and determined that Plaintiff had a robust
2 sense of humor and a bright affect); Tr. 2492 (January 4, 2017: Plaintiff was taking
3 her medications as prescribed with no negative side effects, she had only one
4 flashback in the prior two weeks triggered by conflict with her roommate, her
5 mood was a “little stressed but good,” and her affect was congruent with range and
6 humor); Tr. 2070, 2072 (April 19, 2017: upon mental status examination by
7 Danielle Jenkins, Psy.D., Plaintiff’s memory, concentration, perception, fund of
8 knowledge, and insight and judgment were all within normal limits; Dr. Jenkins
9 diagnosed Plaintiff with chronic PTSD and unspecified personality disorder).

10 However, as argued by Plaintiff, the ALJ’s discussion of the mental health
11 medical evidence largely omits Plaintiff’s therapy records, which consistently
12 document anxious, tearful, depressed, and distressed moods. *See* Tr. 752, 834,
13 878, 951, 999, 1048, 1097, 1099, 1132, 1133, 1135, 1177, 1277, 1297, 1519, 1596,
14 1737, 1738, 1741, 1747, 1749, 2065, 2179, 2207, 2215, 2226, 2270, 2275, 2287,
15 2343 (anxious); □ Tr. 752, 988, 996, 1031, 1034, 1062, 1067, 1100, 1120, 1122,
16 1126, 1130, 1149, 1152, 1156, 1158, 1160, 1169, 1225, 1229, 1596, 1623, 1626,
17 1632, 1637, 1639, 1641, 1663, 1685, 1688, 1710, 1712, 1725, 1761, 1763, 1857,
18 1861, 1863, 1866, 1875, 1879, 1881, 1887, 1905, 1911, 1917, 1921, 1923, 1927,
19 1933, 1937, 1939, 1941, 1946, 1950, 1954, 1957, 1964, 1970, 1982, 2116, 2343,
20 2361, 2367, 2371, 2373, 2382, 2388, 2398, 2400, 2419, 2426, 2458, 2468, 2477,

2481, 2485, 2490 (tearful); Tr. 768, 1048, 1049, 1051, 1096, 1097, 1099, 1116,
1122, 1177, 1207, 1209, 1210, 1623, 1626, 1887, 1913, 1962, 2253, 2391, 2538
(depressed or sad); Tr. 1156, 1685, 1763, 1843, 1855, 1879, 1891, 1982, 2116,
2367, 2466, 2490 (distressed); Tr. 1031, 1048, 1071, 1725, 1859, 1913, 2400,
2477, 2538 (irritable); Tr. 951, 981, 1243, 1297, 2270, 2287 (unkempt); Tr. 1152
(struggling to manage dysregulation); Tr. 1957, 2398 (visibly frightened); Tr. 878
(pressured speech); Tr. 995, 1177, 1319 (fleeting or little eye contact); Tr. 1049,
1097, 1133, 1177, 1210, 1574, 1596 (tense posture). Further, Plaintiff's therapy
records show continued flashbacks, nightmares, intrusive thoughts, feelings of
panic, and thoughts of suicide. *See* Tr. 999 (July 26, 2013: continued nightmares
and flashbacks, increase in their frequency); Tr. 1152 (December 5, 2013: constant
intrusive thoughts of traumas, no flashbacks, passing thoughts of suicidal intent);
Tr. 1130 (February 27, 2014: "only two flashbacks last week"); Tr. 1126 (March
13, 2014: one flashback during the past week); Tr. 1067 (August 20, 2014: no
flashbacks, but passing thoughts of suicidal intent); Tr. 1062 (August 27, 2014:
passing thoughts of suicidal intent); Tr. 1049 (September 9, 2014: suicidal
thoughts); Tr. 1207 (December 10, 2014: Plaintiff noticed a decrease in flashbacks,
from 10 a week down to four a week, a decrease in anxiety, but an increase in
suicidal thoughts with a plan); Tr. 1596 (February 10, 2015: Plaintiff experienced
"what appeared to be a panic attack" while at the Horizons clubhouse); Tr. 1688

1 (June 26, 2015: Plaintiff experienced feelings of shame and panic associated with
2 housework); Tr. 1913 (July 8, 2016: increased depression over the prior two
3 months and getting progressively worse); Tr. 1911 (July 15, 2016: “triggered for a
4 few flashbacks” during the past week, was able to prevent a flashback from
5 occurring on several occasions); Tr. 1861 (October 19, 2016: daily nightmares,
6 flashbacks of abuse events); Tr. 2485 (January 27, 2017: several flashbacks over
7 the past week); Tr. 2388 (July 12, 2017: a recent flashback and two episodes of
8 enuresis paired with nightmares about specific trauma). The ALJ must consider all
9 of the relevant evidence in the record and may not point to only those portions of
10 the records that bolster his findings. *See, e.g., Holohan v. Massanari*, 246 F.3d
11 1195, 1207-08 (9th Cir. 2001) (holding that an ALJ cannot selectively rely on
12 some entries in a claimant’s records while ignoring others); *see also Norman v.*
13 *Berryhill*, No. 17-CV-04108-SI, 2018 WL 4519952, at *9 (N.D. Cal. Sept. 19,
14 2018) (unpublished) (ALJ may not discount a claimant’s testimony that she was
15 depressed on the basis of mental status examinations by providers who diagnosed
16 the claimant with clinical depression); *see also Ghanim*, 763 F.3d at 1164 (The
17 Ninth Circuit found the ALJ improperly rejected the symptom testimony of a
18 claimant who reported depression and social anxiety, stating the ALJ “improperly
19 cherry-picked some of [the examining physician’s] characterizations of Ghanim’s
20 rapport and demeanor instead of considering these factors in the context of [the

1 physician's] diagnoses and observations of impairment.”). The Commissioner
2 asserts that Plaintiff's competing interpretation of the evidence must fail. ECF No.
3 16-1 at 11. However, the ALJ selectively discussed the mental impairment
4 evidence of record. Tr. 22-23. In citing portions of the record that show milder
5 examination findings while the longitudinal record shows more mixed results, the
6 ALJ's characterization of the record is not supported by substantial evidence.

7 b. Physical Impairments

8 The ALJ discussed Plaintiff's alleged physical symptoms that caused her to
9 be unable to work, such as issues with her weight and chronic pain, and determined
10 that Plaintiff's physical complaints were out of proportion to the objective medical
11 evidence. Tr. 21. As to Plaintiff's claims of limitation due to her obesity, the ALJ
12 found that although her weight remained in the obesity range, she had not
13 developed secondary complications due to her weight such as diabetes or heart
14 disease. Tr. 21 (citing Tr. 1273, 1277, 1283, 1286, 1289, 2229, 2243, 2275). The
15 ALJ also noted that Plaintiff's doctor reported she had lost 30 pounds in two to
16 three months, and Plaintiff was trying to get approval for bariatric surgery. Tr. 21
17 (citing Tr. 2277). The ALJ failed to identify what in Plaintiff's symptom
18 testimony was inconsistent with the evidence or to explain how the evidence was
19 inconsistent. Indeed, the ALJ's reasoning is unclear because some of the evidence
20 identified by the ALJ could reasonably support Plaintiff's symptom allegations.

1 See Tr. 1273, 1277, 1283, 1286, 1289, 2229, 2243, 2275 (Plaintiff's weight
2 remained in the obesity range); Tr. 2277 (July 23, 2015: Plaintiff was trying to get
3 approval for bariatric surgery). The ALJ failed to sufficiently explain why the
4 claims were discredited. *Thomas*, 278 F.3d at 958.

5 The ALJ also noted that despite Plaintiff's ongoing diagnosis of asthma, her
6 symptoms improved with Albuterol when treated for acute exacerbation of asthma
7 stemming from pneumonia/wheezing, and physical examinations consistently
8 showed normal respiratory examination findings. Tr. 21 (citing Tr. 981, 1282,
9 1284-87). The ALJ observed that Plaintiff complained of leg pain and the state
10 agency medical consultant found the record supported a diagnosis of chronic
11 venous insufficiency, but physical examinations consistently showed no edema,
12 normal gait, and normal station. Tr. 21 (citing Tr. 1289, 1292, 2234, 2250, 2259).
13 The ALJ stated that although Plaintiff presented at the hearing with a cane, there
14 was no objective evidence to support that a cane was medically necessary. Tr. 22
15 (citing Tr. 2178, 2180). Finally, the ALJ found that Plaintiff had a history of
16 polycystic ovarian syndrome, but she underwent a hysterectomy in July 2014 and
17 later reported she was feeling well with good energy, and there were no ongoing
18 related complaints. Tr. 22 (citing Tr. 949, 1246, 1244-45, 2178, 2185, 2192,
19 2197). The record supports the ALJ's conclusion that Plaintiff's asthma was
20 controlled with medication, Plaintiff consistently had a normal gait and station and

1 there was no objective evidence that a cane was medically necessary, and that
2 Plaintiff did not have ongoing problems related to polycystic ovarian syndrome.
3 Tr. 21-22. However, Plaintiff did not testify in either of her hearings to functional
4 limitations caused by asthma, chronic venous insufficiency, or polycystic ovarian
5 syndrome, nor are these impairments a primary basis for Plaintiff's claim of
6 disability. Tr. 516-24, 567-75, 612-19. The ALJ did not explain how the fact that
7 Plaintiff's asthma was controlled with medication, chronic venous insufficiency
8 did not cause a gait disturbance, or polycystic ovarian syndrome did not cause
9 ongoing problems, undermined Plaintiff's symptom testimony as to her limitations
10 stemming from obesity and chronic pain, which form the basis of Plaintiff's claim
11 for disability. Tr. 21-22; *Ghanim*, 763 F.3d at 1163 (requiring the ALJ to
12 sufficiently explain why it discounted claimant's symptom claims). Without more
13 explanation of how this evidence undermined Plaintiff's symptom reporting, this
14 was not a clear and convincing reason to discredit Plaintiff's testimony as to her
15 physical impairments.

16 2. *Inconsistent with Activities*

17 The ALJ found that Plaintiff's activities were inconsistent with the level of
18 impairment Plaintiff alleged. Tr. 21, 23. An ALJ may consider a claimant's
19 activities that undermine reported symptoms. *Rollins*, 261 F.3d at 857. If a
20 claimant can spend a substantial part of the day engaged in pursuits involving the

1 performance of exertional or nonexertional functions, the ALJ may find these
2 activities inconsistent with the reported disabling symptoms. *Fair v. Bowen*, 885
3 F.2d 597, 603 (9th Cir. 1989); *Molina*, 674 F.3d at 1113. “While a claimant need
4 not vegetate in a dark room in order to be eligible for benefits, the ALJ may
5 discount a claimant’s symptom claims when the claimant reports participation in
6 everyday activities indicating capacities that are transferable to a work setting” or
7 when activities “contradict claims of a totally debilitating impairment.” *Molina*,
8 674 F.3d at 1112-13.

9 a. Mental Impairments

10 The ALJ found that Plaintiff’s activities were inconsistent with her claims of
11 difficulty being around many people. Tr. 23; *see* Tr. 990 (September 2013:
12 Plaintiff was spending more time in positive social contacts); Tr. 2343 (March
13 2017: Plaintiff attended a birthday/graduation party); Tr. 2339 (May 2017: Plaintiff
14 made bread for an anniversary BBQ and she was active in helping the culinary unit
15 get prepared with different sides dishes); Tr. 2390 (July 2017: Plaintiff volunteered
16 at the Needle Exchange as a survey taker). However, Plaintiff’s treatment notes
17 demonstrate that she continued to have some difficulty in these social situations.
18 *See, e.g.*, Tr. 1596 (February 10, 2015: while at the Horizons clubhouse, Plaintiff
19 “was initially social and engaging with her peers” until she “experienced what
20 appeared to be a panic attack and medical staff was informed and asked to see

her,” she “returned to her normal state after approximately 45 minutes from onset of expression,” and after lunch and more socializing with her peers, Plaintiff was “feeling very fatigued”); Tr. 2333 (June 2, 2017: Plaintiff became involved in a “heated discussion” with a staff member); Tr. 2331 (June 8, 2017: Plaintiff was noted to be “working on interpersonal issues with another member”); Tr. 2322 (August 3, 2017: Plaintiff manifested aggressive behavior). Further, although Plaintiff attended a birthday/graduation party in March 2017, as cited by the ALJ, she expressed a great deal of anxiety attending this social event and “appeared to have a good time . . . until she disagreed with peers and felt they were laughing at her. She became tearful and talked at length with staff.” Tr. 2343. Moreover, the same therapy note cited by the ALJ to indicate that Plaintiff enjoyed volunteering as a survey taker also reported her anxiety had decreased but her depression symptoms had increased, and she had been engaging in self-harm by poking herself with pins until she bled. Tr. 2390. The ALJ’s conclusion that Plaintiff’s activities were inconsistent with her alleged difficulty being around many people is not supported by substantial evidence. Plaintiff testified that she does not like being around “that many people” because her “anxiety flares.” Tr. 110. Plaintiff’s ability to attend one birthday/graduation party, actively participate in helping prepare different side dishes for one BBQ, and volunteer at the Needle Exchange, along with a treatment note acknowledging her report that she was spending more

1 time in positive social contacts, when considered in the context of the record as a
2 whole, are not inconsistent with the limitations Plaintiff reported. This finding is
3 not supported by substantial evidence.

4 b. Physical Impairments

5 The ALJ also concluded that Plaintiff's activities were inconsistent with the
6 physical limitations she alleged. Tr. 21. The ALJ observed that although Plaintiff
7 testified to limited exercise such as walking one block, Tr. 112, she also reported
8 physical activities including walking daily, walking with her housemate and her
9 housemate's dog, going to the pool two times per week, and pulling weeds in a
10 garden. Tr. 21; *see* Tr. 2069, 2331, 2537.

11 Plaintiff challenges the ALJ's finding by asserting that "[b]ecause the record
12 does not specify how long she walked, swam, or pulled weeds, it is not clear that
13 there is an inconsistency in these reports." ECF No. 14 at 13. Plaintiff testified
14 that she is sometimes able to walk partially around the block, but that can take up
15 to an hour. Tr. 122. In finding Plaintiff's physical activities inconsistent with her
16 testimony, the ALJ never addressed the frequency or length of Plaintiff's reported
17 walks. Tr. 21. He failed to cite to any evidence that Plaintiff walked for exercise
18 or walked with her housemate and her housemate's dog in any manner that was
19 inconsistent with the testimony Plaintiff provided about her limitations. Tr. 21; *see*
20 *Jordan v. Astrue*, 262 F. App'x 843, 845 (9th Cir. 2008) (unpublished) (claimant's

1 ability to do some therapeutic exercises was not inconsistent with allegation that he
2 needed to lie down regularly to alleviate pain). Moreover, the ALJ failed to
3 explain how Plaintiff's report that she went to the pool or pulled weeds in a garden
4 were inconsistent with her testimony about her level of physical activity. Tr. 21.
5 Rather, Plaintiff testified at her first hearing that when in the pool she would "walk
6 from the shallow end to just before the deep end" and then walk back for "gentle
7 exercise." Tr. 79. Therefore, this reason to discredit Plaintiff's symptom
8 testimony is not specific, clear and convincing.

9 *3. Mental Health Symptoms Improved with Treatment*

10 The ALJ discounted Plaintiff's mental health symptom claims as
11 inconsistent with her improvement with treatment. Tr. 22-23. The effectiveness of
12 treatment is a relevant factor in determining the severity of a claimant's symptoms.
13 20 C.F.R. § 416.929(c)(3) (2017); *Warre v. Comm'r of Soc. Sec. Admin.*, 439 F.3d
14 1001, 1006 (9th Cir. 2006) (determining that conditions effectively controlled with
15 medication are not disabling for purposes of determining eligibility for benefits);
16 *Tommasetti v. Astrue*, 533 F.3d 1035, 1040 (9th Cir. 2008) (recognizing that a
17 favorable response to treatment can undermine a claimant's complaints of
18 debilitating pain or other severe limitations).

19 The ALJ noted that Plaintiff reported improvements in her mental health
20 symptoms with treatment and medications. Tr. 22-23; *see* Tr. 990 (September

1 2013: Plaintiff described effective use of containment strategies for intrusive
2 thoughts and flashbacks); Tr. 1140 (January 2014: Plaintiff reported that she was
3 benefitting from a medication trial and sleeping through the night); Tr. 1128
4 (March 2014: Plaintiff reported that her mood was better and she had a “significant
5 decrease” in nightmares and flashbacks); Tr. 2492 (January 2017: Plaintiff was
6 taking her medications as prescribed with no negative side effects; she reported
7 that she had only one flashback in the past two weeks triggered by conflict with her
8 roommate).

9 Although the ALJ provided several references to treatment notes to show
10 that Plaintiff’s mental health symptoms were improving with treatment and
11 medication at certain times throughout the relevant period, the ALJ relied on these
12 few instances to conclude more broadly that Plaintiff’s mental health condition
13 overall improved with treatment. Observations of improvement must be “read in
14 context of the overall diagnostic picture” of an individual, and improvement in
15 some symptoms does not indicate nondisability under the Social Security Act.
16 *Ghanim*, 763 F.3d at 1161-62 (quoting *Holohan*, 246 F.3d at 1205). The ALJ is
17 not permitted to “cherry pick” from mixed evidence to support a denial of benefits.
18 *Garrison*, 759 F.3d at 1017 n.23. The ALJ’s selection of treatment notes
19 indicating some intermittent improvement in her mental symptoms do not
20 represent overall improvement when read in the context of the entire 2,500-page

1 record. As discussed *supra*, Plaintiff continued to experience flashbacks,
2 nightmares, intrusive thoughts, depression, feelings of panic, and thoughts of
3 suicide despite her use of medication and participation in treatment. *See, e.g.*, Tr.
4 1062 (August 27, 2014: Plaintiff reported taking medications as prescribed and had
5 passing thoughts of suicidal intent); Tr. 1207 (December 10, 2014: Plaintiff
6 reported her response to new medications was “pretty good actually,” and she
7 noticed a decrease in flashbacks, from 10 a week down to four a week, along with
8 a decrease in anxiety, but she experienced an increase in suicidal thoughts with a
9 plan); Tr. 1596 (February 10, 2015: Plaintiff experienced “what appeared to be a
10 panic attack” while at the Horizons clubhouse, and the treatment note describing
11 the episode stated she “will continue with clubhouse for support toward treatment
12 plan goals, follow up with medical staff and primary therapist”); Tr. 1913 (July 8,
13 2016: Plaintiff reported taking all medications as prescribed, she experienced
14 increased depression over the past two months, and her depression was getting
15 progressively worse); Tr. 1911 (July 15, 2016: Plaintiff reported taking
16 medications as prescribed and “triggered for a few flashbacks” during the past
17 week, though she was able to prevent a flashback from occurring on several
18 occasions); Tr. 1861 (October 19, 2016: Plaintiff reported taking medications as
19 prescribed and described daily nightmares and flashbacks of abuse events); Tr.
20 2485 (January 27, 2017: Plaintiff reported taking medications as prescribed and

1 reported several flashbacks over the past week); Tr. 2388 (July 12, 2017: Plaintiff
2 reported taking medications as prescribed and described a recent flashback and two
3 episodes of enuresis paired with nightmares about specific trauma). The ALJ's
4 conclusion that Plaintiff's mental health symptoms improved with treatment and
5 medication based on the few select notations of improvement is not supported by
6 the longitudinal record. *See Garrison*, 759 F.3d at 1017 (“[c]ycles of improvement
7 and debilitating symptoms are a common occurrence, and in such circumstances it
8 is error for an ALJ to pick out a few isolated instances of improvement over a
9 period of months or years and to treat them as a basis for concluding a claimant is
10 capable of working.”); *see also Holohan*, 246 F.3d at 1205 (“[The treating
11 physician's] statements must be read in context of the overall diagnostic picture he
12 draws. That a person who suffers from severe panic attacks, anxiety, and
13 depression makes some improvement does not mean that the person's impairments
14 no longer seriously affect her ability to function in a workplace.”). This was not a
15 clear and convincing reason to discredit Plaintiff's symptom testimony.

16 As discussed *supra*, the reasons the ALJ provided to discredit Plaintiff's
17 mental and physical symptom testimony are not supported by substantial evidence.
18 *Ghanim*, 763 F.3d at 1163. Further, the ALJ's selective discussion of the mental
19 impairment evidence also informed the ALJ's evaluation of several medical
20 opinions. Tr. 22-24, 179-80. The Court “may not reverse an ALJ's decision on

1 account of an error that is harmless.” *Molina*, 674 F.3d at 111. An error is
2 harmless “where it is inconsequential to the [ALJ’s] ultimate nondisability
3 determination.” *Id.* at 1115 (quotation and citation omitted). The ALJ’s errors are
4 not harmless. On remand, the ALJ is instructed to reconsider the evidence of
5 Plaintiff’s mental impairments and to take testimony from a mental health medical
6 expert. The ALJ shall also reconsider Plaintiff’s mental and physical symptom
7 testimony.

8 **C. Medical Opinion Evidence**

9 Plaintiff challenges the ALJ’s evaluation of the medical opinions of Ginger
10 Longo, M.D., Mara Fusfield, ARNP, Norman Staley, M.D., Mark Duris, Ph.D.,
11 Rebekah Cline, Psy.D., Danielle Jenkins, Psy.D., Jamie Walker, ARNP, Mary Day,
12 MS, Vincent Gollogly, Psy.D., and Patricia Kraft, Ph.D. ECF No. 14 at 14-21.

13 There are three types of physicians: “(1) those who treat the claimant
14 (treating physicians); (2) those who examine but do not treat the claimant
15 (examining physicians); and (3) those who neither examine nor treat the claimant
16 [but who review the claimant’s file] (nonexamining [or reviewing] physicians).”
17 *Holohan*, 246 F.3d at 1201-02 (citations omitted). Generally, a treating
18 physician’s opinion carries more weight than an examining physician’s opinion,
19 and an examining physician’s opinion carries more weight than a reviewing
20 physician’s opinion. *Id.* at 1202. “In addition, the regulations give more weight to

1 opinions that are explained than to those that are not, and to the opinions of
2 specialists concerning matters relating to their specialty over that of
3 nonspecialists.” *Id.* (citations omitted).

4 If a treating or examining physician’s opinion is uncontradicted, the ALJ
5 may reject it only by offering “clear and convincing reasons that are supported by
6 substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).
7 “However, the ALJ need not accept the opinion of any physician, including a
8 treating physician, if that opinion is brief, conclusory, and inadequately supported
9 by clinical findings.” *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228
10 (9th Cir. 2011) (internal quotation marks and brackets omitted). “If a treating or
11 examining doctor’s opinion is contradicted by another doctor’s opinion, an ALJ
12 may only reject it by providing specific and legitimate reasons that are supported
13 by substantial evidence.” *Bayliss*, 427 F.3d at 1216 (citing *Lester*, 81 F.3d at 830–
14 31). The opinion of a nonexamining physician may serve as substantial evidence if
15 it is supported by other independent evidence in the record. *Andrews v. Shalala*,
16 53 F.3d 1035, 1041 (9th Cir. 1995).

17 “Only physicians and certain other qualified specialists are considered
18 ‘[a]cceptable medical sources.’ ” *Ghanim*, 763 F.3d at 1161 (alteration in original);
19
20

1 *see* 20 C.F.R. § 416.913 (2013).⁷ However, an ALJ is required to consider
2 evidence from non-acceptable medical sources. *Sprague v. Bowen*, 812 F.2d 1226,
3 1232 (9th Cir. 1987); 20 C.F.R. § 416.913(d) (2013). “Other sources” include
4 nurse practitioners, physicians’ assistants, therapists, teachers, social workers,
5 spouses and other non-medical sources. 20 C.F.R. § 416.913(d) (2013). An ALJ
6 may reject the opinion of a non-acceptable medical source by giving reasons
7 germane to the opinion. *Ghanim*, 763 F.3d at 1161.

8 *I. Dr. Longo*

9 On June 26, 2013, Plaintiff’s treating gynecologist, Ginger Longo, M.D.,
10 opined that it was difficult for Plaintiff to perform many physical activities due to
11 her weight and ability to sustain increased activity. Tr. 957. She also opined that
12 Plaintiff had difficulty being out in public because of issues with anxiety and
13 PTSD, which would also limit her ability to perform at a consistent level of
14 employment. Tr. 957. Dr. Longo noted that Plaintiff was working on improving
15 these limitations, “but is not quite ready to enter into a position of steady
16 employment.” Tr. 957.

17
18 ⁷ For cases filed prior to March 27, 2017, the definition of an acceptable medical
19 source, as well as the requirement that an ALJ consider evidence from non-
20 acceptable medical sources, are located at 20 C.F.R. § 416.913 (2013).

1 The ALJ gave Dr. Longo's opinion little weight.⁸ Tr. 180. Because Dr.
2 Longo's opinion was contradicted by the nonexamining opinion of Norman Staley,
3 M.D., Tr. 154-69., the ALJ was required to provide specific and legitimate reasons
4 for discounting Dr. Longo's opinion. *Bayliss*, 427 F.3d at 1216.

5 a. Inadequate Explanation

6 The ALJ rejected Dr. Longo's opinion because she did not include any
7 examination findings in support of her opinion. Tr. 180. The Social Security
8 regulations "give more weight to opinions that are explained than to those that are
9 not." *Holohan*, 246 F.3d at 1202. "[T]he ALJ need not accept the opinion of any
10 physician, including a treating physician, if that opinion is brief, conclusory and
11 inadequately supported by clinical findings." *Bray*, 554 F.3d at 1228. Relevant
12 factors to evaluating any medical opinion include the amount of relevant evidence
13 that supports the opinion, the quality of the explanation provided in the opinion,
14 and the consistency of the medical opinion with the record. *Lingenfelter v. Astrue*,
15 504 F.3d 1028, 1042 (9th Cir. 2007); *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir.

16
17 ⁸ The ALJ gave Dr. Longo's opinion little weight in his first decision. Tr. 180.
18 The Appeals Council did not disturb the ALJ's findings or assessment regarding
19 Dr. Longo, and the ALJ adopted and incorporated his assessment and discussion of
20 Dr. Longo's opinion in his second decision. Tr. 23.

2007). Here, Dr. Longo's June 26, 2013 letter simply stated that it was difficult for Plaintiff to perform many physical activities due to her weight and ability to sustain increased activity, she had difficulty being out in public because of issues with anxiety and PTSD, which would limit her ability to perform at a consistent level of employment, and Plaintiff was "not quite ready to enter into a position of steady employment." Tr. 957. The ALJ was correct that Dr. Longo did not cite any examination findings in support of her opinion. However, that Dr. Longo did not include any examination findings in support of her opinion is not enough by itself to discount her treating opinion if it was otherwise adequately supported by Dr. Longo's medical notes. *See Garrison*, 759 F.3d at 1014 n.17; *see also Trevizo v. Berryhill*, 871 F.3d 664, 667 n.4 (9th Cir. 2017). Plaintiff's treatment notes show that Dr. Longo regularly counseled Plaintiff on weight loss. Tr. 958, 961, 964, 966. However, Plaintiff consistently reported no back pain, joint pain, or fatigue during her visits with Dr. Longo, and treatment was focused on menorrhagia and placement and removal of an intrauterine device. Tr. 958-59, 961-62, 964-67. Dr. Longo's opinion was not adequately supported by her treatment notes. Moreover, even if the ALJ erred by discounting Dr. Longo's opinion because she did not include any examination findings in support of her opinion, this error is harmless because, as discussed *infra*, Dr. Longo's opinion was vague and she failed to provide any functional limitations. Further, Plaintiff

1 did not challenge this reason articulated by the ALJ, thus any challenge is waived.
2 *Kim v. Kang*, 154 F.3d 996, 1000 (9th Cir. 1998) (the Court may not consider on
3 appeal issues not “specifically and distinctly argued” in the party’s opening brief).

4 b. Opines No Functional Limitations

5 The ALJ discredited Dr. Longo’s opinion because it was vague and she
6 failed to specifically state how Plaintiff would be limited. Tr. 180. An ALJ may
7 reject an opinion that does “not show how [a claimant’s] symptoms translate into
8 specific functional deficits which preclude work activity.” *See Morgan v. Comm’r*
9 *of Soc. Sec. Admin.*, 169 F.3d 595, 601 (9th Cir. 1999). Dr. Longo’s opinion was
10 vague, as she simply stated it was difficult for Plaintiff to perform many physical
11 activities due to her weight and ability to sustain increased activity, and she was
12 not quite ready to enter into a position of steady employment. Tr. 957. Dr. Longo
13 provided no further explanation of her opinion about Plaintiff’s capacity to work.
14 She did not provide any function-by-function analysis of Plaintiff’s limitations, nor
15 detail what physical activities would be difficult for Plaintiff to perform. The ALJ
16 reasonably discredited these findings as vague and not sufficiently explained. Tr.
17 180. This was a specific and legitimate reason to discredit Dr. Longo’s opinion.

18 2. *Ms. Fusfield*

19 On March 24, 2017, Mara Fusfield, ARNP, completed a physical functional
20 evaluation and diagnosed Plaintiff with back pain, arthritis, spinal stenosis, obesity,

1 polycystic ovarian syndrome, and PTSD. Tr. 2061-63. She determined that
2 Plaintiff could only walk for one and a half blocks, stand for three to four minutes,
3 not carry any weight, and lift less than 20 pounds. Tr. 2062. Ms. Fusfield also
4 found that pulling was a problem for Plaintiff, but pushing was okay. Tr. 2062.
5 She noted that Plaintiff's PTSD decreased her ability to communicate, Plaintiff
6 heard things from the past that were not there, and she experienced flashbacks. Tr.
7 2062. Ms. Fusfield opined that Plaintiff was severely limited and unable to meet
8 the demands of sedentary work. Tr. 2063. The ALJ gave Ms. Fusfield's opinion
9 little weight. Tr. 23. Because Ms. Fusfield was an "other source," the ALJ was
10 required to provide germane reasons to discount her opinion. *Dodrill v. Shalala*,
11 12 F.3d 915, 918 (9th Cir. 1993).

12 The ALJ noted that Ms. Fusfield's opinion was inconsistent with her
13 treatment notes and Plaintiff's generally benign physical examinations that were
14 administered by Ms. Fusfield. Tr. 23. A medical opinion may be rejected if it is
15 unsupported by medical findings. *Bray*, 554 F.3d at 1228; *Batson v. Comm'r of*
16 *Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004); *Thomas*, 278 F.3d at 957;
17 *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001); *Matney v. Sullivan*,
18 981 F.2d 1016, 1019 (9th Cir.1992). Furthermore, a physician's opinion may be
19 rejected if it is unsupported by the physician's treatment notes. *Connett v.*
20 *Barnhart*, 340 F.3d 871, 875 (9th Cir. 2003). Relevant factors to evaluating any

1 medical opinion include the amount of relevant evidence that supports the opinion,
2 the quality of the explanation provided in the opinion, and the consistency of the
3 medical opinion with the record as a whole. *Lingenfelter*, 504 F.3d at 1042; *Orn*,
4 495 F.3d at 631. During Plaintiff's March 2017 office visit, Ms. Fusfield noted
5 that Plaintiff's greatest challenge was her weight. Tr. 2214. Consistent with that
6 observation, Ms. Fusfield primarily encouraged weight loss and smoking cessation
7 during medical visits with Plaintiff. Tr. 1295, 2187, 2190, 2207, 2215. While Ms.
8 Fusfield also noted in March 2017 that Plaintiff had arthritis in her lumbar spine
9 with stenosis and some spinal stenosis in her neck, she indicated moderate
10 tenderness of Plaintiff's spine with an otherwise unremarkable physical
11 examination. Tr. 2214-15. Physical examinations by Ms. Fusfield throughout the
12 relevant period were generally benign. Tr. 1294-95, 2187, 2190, 2206-07, 2215.
13 This was a germane reason to discount Ms. Fusfield's opined limitations.

14 *3. Dr. Staley*

15 On October 2, 2013, state agency medical consultant Norman Staley, M.D.,
16 reviewed the medical record and opined that Plaintiff could frequently and
17 occasionally lift and/or carry 10 pounds, stand and/or walk for two hours, and sit
18 for more than six hours on a sustained basis in an eight-hour workday. Tr. 154-69.
19 He determined that Plaintiff could frequently stoop, occasionally climb ramps and
20 stairs, kneel, crouch, and crawl, and never climb ladders, ropes, or scaffolds due to

1 her obesity. Tr 164. Dr. Staley noted that Plaintiff should avoid concentrated
2 exposure to extreme heat and cold, fumes, odors, dusts, gases, poor ventilation, and
3 hazards. Tr. 164-65. The ALJ gave Dr. Staley's opinion great weight.⁹ Tr. 179.

4 Plaintiff contends the ALJ erred by giving great weight to the opinion of Dr.
5 Staley, a state agency medical consultant who reviewed the record in October
6 2013, and little weight to Plaintiff's treating and examining providers. ECF No. 14
7 at 17-18. The opinion of a nonexamining physician may serve as substantial
8 evidence if it is supported by other evidence in the record and is consistent with it.
9 *Andrews*, 53 F.3d at 1041. Other cases have upheld the rejection of an examining
10 or treating physician based in part on the testimony of a nonexamining medical
11 advisor when other reasons to reject the opinions of examining and treating
12 physicians exist independent of the nonexamining doctor's opinion. *Lester*, 81
13 F.3d at 831 (citing *Magallanes v. Bowen*, 881 F.2d 747, 751-55 (9th Cir. 1989)
14 (reliance on laboratory test results, contrary reports from examining physicians and
15 testimony from claimant that conflicted with treating physician's opinion));

16 _____
17 ⁹ The ALJ gave great weight to Dr. Staley's opinion in his first decision. Tr. 179.
18 The Appeals Council did not disturb the ALJ's findings or assessment regarding
19 Dr. Staley, and the ALJ adopted and incorporated his assessment and discussion of
20 Dr. Staley's opinion in his second decision. Tr. 23.

1 *Roberts v. Shalala*, 66 F.3d 179, 184 (9th Cir. 1995) (rejection of examining
2 psychologist's functional assessment which conflicted with his own written report
3 and test results). Thus, case law requires not only an opinion from the consulting
4 physician but also substantial evidence (more than a mere scintilla but less than a
5 preponderance), independent of that opinion which supports the rejection of
6 contrary conclusions by examining or treating physicians. *Andrews*, 53 F.3d at
7 1039.

8 The ALJ found the opinion of Dr. Staley was consistent with Plaintiff's
9 physical medical records that showed Plaintiff was obese and appeared to have
10 recovered from her hysterectomy. Tr. 179 (citing Tr. 154-69). Plaintiff suggests
11 the ALJ should have credited the opinions of Plaintiff's treating and examining
12 providers over the "stale 2013" opinion of the reviewing doctor. ECF No. 14 at
13 17. However, as discussed *supra*, the ALJ provided legally sufficient reasons for
14 giving less weight to the opinions of the treating and examining providers and for
15 giving more weight to Dr. Staley's opinion. Moreover, although Ms. Fusfield's
16 opinion as to Plaintiff's physical limitations was more recent as it was rendered on
17 March 24, 2017, Tr. 2061-63, Dr. Longo issued her opinion on June 26, 2013, Tr.
18 957, prior to the issuance of Dr. Staley's opinion. ECF No. 14 at 17.

1 **D. Other Challenges**

2 Plaintiff raises challenges to the ALJ’s evaluation of Plaintiff’s mental
3 health providers. ECF No. 14 at 14-21. As discussed *supra*, the ALJ’s selective
4 discussion of the mental impairment evidence also informed the ALJ’s evaluation
5 of the mental medical opinions. Tr. 22-24, 179-80. Because this case is remanded
6 to reconsider the mental impairment evidence and Plaintiff’s symptom testimony,
7 both mental and physical, the Court declines to address these challenges here. On
8 remand, the ALJ is instructed to reconsider the evidence as to Plaintiff’s mental
9 impairments and to take testimony from a mental health medical expert. The ALJ
10 shall reconsider Plaintiff’s mental and physical symptom testimony and reevaluate
11 the mental medical opinion evidence.

12 **E. Remedy**

13 Plaintiff urges this Court to remand for an immediate award of benefits.
14 ECF No. 14 at 21. “The decision whether to remand a case for additional
15 evidence, or simply to award benefits is within the discretion of the court.”
16 *Sprague*, 812 F.2d at 1232 (citing *Stone v. Heckler*, 761 F.2d 530, 533 (9th Cir.
17 1985)). When the Court reverses an ALJ’s decision for error, the Court “ordinarily
18 must remand to the agency for further proceedings.” *Leon v. Berryhill*, 880 F.3d
19 1041, 1045 (9th Cir. 2017); *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir.
20 2004) (“[T]he proper course, except in rare circumstances, is to remand to the

1 agency for additional investigation or explanation”); *Treichler v. Comm’r of Soc.*
2 *Sec. Admin.*, 775 F.3d 1090, 1099 (9th Cir. 2014). However, in a number of Social
3 Security cases, the Ninth Circuit has “stated or implied that it would be an abuse of
4 discretion for a district court not to remand for an award of benefits” when three
5 conditions are met. *Garrison*, 759 F.3d at 1020 (citations omitted). Under the
6 credit-as-true rule, where (1) the record has been fully developed and further
7 administrative proceedings would serve no useful purpose; (2) the ALJ has failed
8 to provide legally sufficient reasons for rejecting evidence, whether claimant
9 testimony or medical opinion; and (3) if the improperly discredited evidence were
10 credited as true, the ALJ would be required to find the claimant disabled on
11 remand, the Court will remand for an award of benefits. *Revels v. Berryhill*, 874
12 F.3d 648, 668 (9th Cir. 2017). Even where the three prongs have been satisfied,
13 the Court will not remand for immediate payment of benefits if “the record as a
14 whole creates serious doubt that a claimant is, in fact, disabled.” *Garrison*, 759
15 F.3d at 1021.

16 Here, it is not clear from the record that the ALJ would be required to find
17 Plaintiff disabled if all the evidence were properly evaluated. Even if the ALJ
18 were to fully credit Plaintiff’s symptom testimony, the evidence would still present
19 outstanding conflicts for the ALJ to resolve. First, as discussed *supra*, the ALJ
20 provided legally sufficient reasons to discount the opinions of Plaintiff’s treating

1 providers as to her physical limitations. Second, the ALJ selectively discussed the
2 mental impairment evidence of record, specifically Plaintiff's mental status
3 examination results and mental health treatment notes. Tr. 22-23. In rejecting the
4 opinions of Plaintiff's treating and examining mental health providers, the ALJ
5 found, in part, that their opinions were not consistent with mental status
6 examination results and treatment notes. Tr. 23-24, 180. Further, the ALJ credited
7 the opinions of nonexamining psychological consultants Drs. Gollogly and Kraft,
8 who opined that Plaintiff was capable of performing a range of sedentary work,
9 while assigning some or little weight to Plaintiff's treating and examining mental
10 health providers. Tr. 23-24, 180. Therefore, further proceedings are necessary for
11 the ALJ to reconsider Plaintiff's symptom testimony and reevaluate the mental
12 health medical opinion evidence. On remand, the ALJ is instructed to reconsider
13 the evidence of Plaintiff's mental impairments, take testimony from a mental
14 health medical expert, reconsider Plaintiff's mental and physical symptom
15 testimony, and reevaluate the mental medical opinion evidence.

1 **CONCLUSION**

2 Having reviewed the record and the ALJ's findings, the Court concludes the
3 ALJ's decision is not supported by substantial evidence and free of harmful legal
4 error. Accordingly, **IT IS HEREBY ORDERED:**

5 1. The District Court Executive is directed to substitute Andrew M. Saul as
6 the Defendant and update the docket sheet.

7 2. Plaintiff's Motion for Summary Judgment, **ECF No. 14**, is **GRANTED**.

8 3. Defendant's Motion for Summary Judgment, **ECF No. 15**, is **DENIED**.¹⁰

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18 ¹⁰ As indicated in footnote 4, Defendant's motion for summary judgment is
19 pending as ECF No. 15. However, Defendant filed an and amended motion for
20 summary judgment, ECF No. 16 and ECF No. 16-1.

1 4. The Clerk's Office shall enter **JUDGMENT** in favor of Plaintiff
2 REVERSING and REMANDING the matter to the Commissioner of Social
3 Security for further proceedings consistent with this recommendation pursuant to
4 sentence four of 42 U.S.C. § 405(g).

5 The District Court Executive is directed to file this Order, provide copies to
6 counsel, and **CLOSE THE FILE**.

7 DATED January 21, 2020.

8 s/Mary K. Dimke
9 MARY K. DIMKE
 UNITED STATES MAGISTRATE JUDGE